IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1421 OF 2005
IN
EXECUTION APPLICATION NO.60 OF 2005
IN
SUMMONS FOR JUDGMENT NO.818 OF 2002
IN
SUMMARY SUIT NO.2486 OF 2002

Hetal Rajnikant Shah ...Plaintiff
V/s.
M/s.Vimal Enterprises & Others. ...Defendants

Shri.K.K. Tated for the plaintiff.
Shri.G.V. Pandya for defendant No.1 to 3 in support.

CORAM : D.K. DESHMUKH, J.
DATED : 08/09/2006

P.C.:-

1. By this notice of motion defendant No.3 seeks an order setting aside the order passed in summons for judgment whereby decree in the summery suit has been passed.

2. From the averments made in the affidavit filed in support of notice of motion, it is clear that after defendant No.3 was served with writ of summons, defendant No.3 filed his appearance on 26/8/2002. Record shows that the plaintiff served defendant No.3 including defendant No.1 & 2 with the summons for judgment on 1-10-2003. Explanation that has been given for not appearing in the court by the defendant No.3 after being served is that in the month of

March, 2003 draft of consent terms was handed over by the plaintiff to defendant No.3. The explanation can not be accepted. It is not stated that the terms in the draft were acceptable to the defendant No.3.

3. Plaintiff had taken out summons for judgment and served on the defendants in the October, 2003. Under Order 37 of Civil Procedure Code, defendant has to make an application for leave to defend within the time stipulated. In the affidavit defendant No.3 has not given any explanation why he did not apply for leave to defend after being served with the summons for judgment within 10 days of the service. Even assuming that the plaintiff handed over draft of consent terms in March, 2003, the fact that the plaintiff took out and served the summons for judgment in October, 2003 would show that the plaintiff had given up the consent terms. Therefore, it was for the defendant No.3 to explain why he did not apply for leave to defend within 10 days of service of the summons for judgment.

4. Taking overall view of the matter, therefore, notice of motion is disposed of.

(D.K. DESHMUKH, J.)